STATE OF MICHIGAN

COURT OF APPEALS

MELISSA BOODT, as Personal Representative of the Estate of DAVID WALTZ, Deceased,

Plaintiff-Appellant,

v

BORGESS MEDICAL CENTER, MICHAEL ANDREW LAUER, M.D., and HEART CENTER FOR EXCELLENCE, P.C.,

Defendant-Appellees,

and

MICHAEL ANDREW LAUER, M.D., P.C.,

.

Defendant.

FOR PUBLICATION
October 31, 2006
9:05 a.m.

No. 266217
Kalamazoo Circuit Court
LC No. 03-000318-NH

Official Reported Version

Before: White, P.J., Whitbeck, C.J., and Davis, J.

DAVIS, J.

Plaintiff appeals as of right the trial court's order dismissing her wrongful death, medical malpractice claim pursuant to MCR 2.116(C)(7) and (C)(8). The trial court dismissed this action with prejudice because it found plaintiff 's notice of intent to sue, MCL 600.2912b, inadequate, resulting in the suit being untimely. We reverse the dismissal will respect to the individual doctor, we affirm the dismissal with prejudice with respect to the corporate defendants, and we remand the case.

We affirm the dismissal with prejudice with respect to the corporate defendants only because we are bound to follow the earlier holding of this Court in *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), which mandates such a result. Pursuant to MCR 7.215(J)(2), we declare a conflict with *McLean* and state that, if we were not obligated to follow *McLean*, we would order the dismissal to be without prejudice.

I. Facts

On October 6, 2001, decedent David Waltz was admitted to Borgess Medical Center for treatment of cardiac complaints. Defendant Michael Andrew Lauer, M.D., performed a percutaneous transluminal coronary angioplasty[1] (PTCA) on the decedent. During the procedure, Dr. Lauer perforated the decedent's coronary artery, causing massive bleeding. At his deposition, Dr. Lauer admitted that the perforation directly caused the decedent to die of anoxic brain injury. On January 13, 2003, pursuant to MCL 600.2912b, plaintiff served defendants with notice of intent to sue. Plaintiff filed a complaint on June 19, 2003. Defendants moved to dismiss on the ground that plaintiff's notice of intent failed to comply with the statutory requirements. The trial court agreed that the notice of intent was invalid and, because the period of limitations had expired, dismissed the action pursuant to MCR 2.116(C)(7) and (C)(8). Plaintiff appeals the dismissal and, in the alternative, argues that any dismissal should have been without prejudice to permit her successor personal representative to file a new complaint.

II. Standard of Review

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), if the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*., p 119. Under MCR 2.116(C)(8), only the pleadings are considered, and the motion should be granted only if the claims are legally unenforceable. *Id*., pp 119-120. Issues of statutory interpretation present questions of law and are therefore also reviewed de novo. *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005).

III. Legal Standards Applicable to Notices of Intent

A medical malpractice claimant is required, among other prerequisites to commencing suit, to provide a health facility or practitioner with a written notice of intent setting forth several statutorily enumerated statements about the intended suit. MCL 600.2912b; *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 685-686; 684 NW2d 711 (2004). Specifically, under MCL 600.2912b(4):

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.

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[1] This is a medical procedure that is also known as "balloon angioplasty" or simply "angioplasty." It entails inserting a thin balloon-tipped tube into an artery that has narrowed, frequently because of a plaque buildup or a clot, and then inflating the balloon. The purpose is to widen the artery to facilitate blood flow.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

A claimant is not required to ensure that all of the above are *correct*, but the claimant must make a good-faith effort to "set forth [the information] with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." *Roberts*, *supra* at 701. The expected level of specificity must be considered in light of the fact that discovery would not yet have begun. *Id*., p 691. The details need only "allow the potential defendants to understand the claimed basis of the impending malpractice action . . . ." *Id*., p 692 n 7.

The specificity required for the notice of intent is functionally indistinguishable from the standard applicable to general civil complaints. This Court has observed "that a complaint [must] contain a 'statement of the facts' and the 'specific allegations necessary reasonably to inform the adverse party of the nature of the claims' against it." *Nationsbanc Mortgage Corp of Georgia v Luptak*, 243 Mich App 560, 566; 625 NW2d 385 (2000), quoting MCL 2.111(B). Medical malpractice claims must be pleaded so as to "'advise the defendant with reasonable certainty, according to the circumstances of the case, of the facts upon which plaintiff proposes to rely, and will seek to prove . . . .'" *Simonelli v Cassidy*, 336 Mich 635, 644; 59 NW2d 28 (1953), quoting *Creen v Michigan C R Co*, 168 Mich 104, 111-112; 133 NW 956 (1911). Therefore, we conclude that the specificity required of a notice of intent as it addresses each of the subsections under MCL 600.2912b is indistinguishable from the specificity required of a medical malpractice complaint.[2]

With respect to a medical malpractice claim, "'it is essential to allege, with reasonable definiteness and certainty, the duty of the physician or surgeon to the person injured, the breach

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[2] We do not mean to imply that the notice of intent *is* a pleading. It is clearly not an ordinary pleading under the general rule. MCR 2.110(A). An affidavit of merit or an affidavit of meritorious defense, as required by MCL 600.2912d or MCL 600.2912e, is a pleading. *Kowalski v Fiutowski*, 247 Mich App 156, 163-164; 635 NW2d 502 (2001), citing MCR 2.112(L). Our court rules do not explicitly refer to a notice of intent under MCL 600.2912b. However, we only hold that a notice of intent requires no greater specificity than a pleading, especially given that the notice of intent does not itself even commence a suit. Rather, the notice merely advises a potential defendant that a claim exists, in the hopes of "encourag[ing] settlement without the need for formal litigation." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997).

of duty complained of, the causal relation between the breach of duty and the injuries complained of, and resulting damage.'" *Simonelli, supra* at 644, quoting 70 CJS, Physicians and Surgeons, § 61, p 985. Our Supreme Court more recently reaffirmed *Simonelli*, noting that the question "was whether the complaint . . . provided sufficient facts to support a cause of action" and that *Simonelli* "hinged on the importance of fair notice to the defendant and not some procedural quirk . . . ." *Dacon v Transue*, 441 Mich 315, 332-333; 490 NW2d 369 (1992). Significantly, our Supreme Court explained that *Simonelli* "applied general principles of pleading." *Id*., p 332. The important principle is that a defendant must not be forced "to guess upon what grounds plaintiff believes recovery is justified," but at the same time plaintiffs should not be subject to the "straightjacket" of "[e]xtreme formalism . . . ." *Id*., p 329, citing *Clements v Constantine*, 344 Mich 446; 73 NW2d 889 (1955).

It is therefore a deeply entrenched rule of Michigan jurisprudence and basic fairness that all pleadings are sufficient if they communicate to the opposing party the nature of the claims or defenses those pleadings purport to raise. "[I]n the absence of a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication in the guise of statutory construction." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994). A statute "in derogation of the common law, . . . though it may be for the good of the public, must be construed strictly, . . . and [its] provisions can be enforced no farther than they are clearly expressed." *Sibley v Smith*, 2 Mich 486, 490 (1853). We perceive no clear expression by the Legislature that we should impose a heavier burden of specificity on a mere notification of an impending claim than on the complaint itself.

Furthermore, our Supreme Court has explained that MCL 600.2912b *only* requires that the information for the categories be *present* in some readily decipherable form, not that it "be in any particular format." *Roberts*, *supra* at 696. Thus, although separating these pieces of information into separately headed paragraphs may be useful to the reader, and therefore may be the better practice, it is by no means necessary as long as the required information can actually be found somewhere in the document without difficulty.

IV. The Notice of Intent Here

We agree that the notice of intent at issue here could have been structured more helpfully, but we decline to read any part of the notice in isolation. Our analysis examines whether the *notice* contains the required information, not whether any specific portion of the notice does.

A careful reading of the notice of intent fails to reveal *any* indication of how Borgess Medical Center or Heart Center for Excellence, P.C., is involved in the underlying events. The notice of intent does not even indicate how the three named defendants are related. Even a medically sophisticated reader would have to guess at the factual basis for making a claim against Borgess Medical Center or Heart Center for Excellence. Therefore, the notice of intent necessarily fails with respect to Borgess Medical Center and Heart Center for Excellence for failing to set forth a statement of the factual basis for the claim against them, as required by MCL 600.2912b(4)(a).

Conversely, regarding Dr. Lauer, the notice states that "the factual basis for the claim" is that "[o]n October 6, 2001, Mr. Waltz presented to defendants for an elective PTCA. During the

procedure, the defendant caused a perforation which lead to Mr. Waltz' death." There is no guesswork involved in deducing that "the defendant" refers to the only named defendant who is an individual in his own right and, therefore, physically capable of taking the actions resulting in the perforation. A layperson might not know what "an elective PTCA" is, but it is highly unlikely that medical professionals would not understand their own abbreviations simply because they are placed in a legal context. Therefore, the notice of intent adequately notifies defendant Dr. Lauer of the factual basis of the claim alleged against him.

The paragraphs purporting to state the applicable standard of care and the actions that should have been taken to comply with the standard of care both merely refer the reader to the paragraph containing the manner in which the standard of care was breached. Given our Supreme Court's explanation that no particular format need be followed, it is elevating form over function to find these paragraphs necessarily insufficient. In *Roberts*, the notice of intent contained similar internal references. *Roberts*, *supra* at 696-698. However, our Supreme Court did *not* hold that such internal references in any way degrade the notice's usefulness *per se*. Rather, in *Roberts* the notice of intent simply did not contain the necessary information. *Id*. The format of the notice of intent here merely purports to combine the requirements of MCL 600.2912b(4)(b), (c), and (d) into a single paragraph. Although this might be a risky practice that lends itself to misconstruction and appeals, it is not an inherently fatal deficiency. Again, we review the notice as a whole.

The paragraph referred to in the notice contains 28 individual assertions of wrongdoing by defendant. Plaintiff apparently admits that the first 21 of these are mere boilerplate, and indeed they appear to be little more than the generic statements that our Supreme Court deemed inadequate in *Roberts*. However, seven of the subparagraphs set forth specific actions that defendant allegedly failed to take, thereby breaching the applicable standard of care. These seven subparagraphs are distinct, cleanly phrased, and, even though they follow boilerplate language, they are not in any way hidden. Any reader of the document could not help but become aware of the specific breaches being alleged against Dr. Lauer. Because the notice as a whole could only be construed as applying against the individual defendant, it is not necessary to name him for the reader to understand that these allegations are only leveled against him. These seven subparagraphs satisfy the requirements of MCL 600.2912b(4)(b) and (c). They are as follows:

> v. Failed to earlier terminate the procedure when the lesion could not be initially crossed with the wire;
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> w. Failed to timely recognize the perforation and stop the anticoagulation and order an echocardiogram;
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> x. Failed to timely insert a balloon pump after the perforation was recognized;
>
> y. Failed to timely perform a pericardiocentesis once the perforation was recognized;

z. Failed to perform repeat attempts of pericardiocentesis after the first failed;

aa. Failed to timely contact a surgeon once the perforation was recognized;

bb. Failed to keep the LAD [left anterior descending artery] wire in place in order to maintain access to that vessel.

Although these subparagraphs are phrased in the negative, i.e., stating what actions defendant *failed* to take, there is no reason to presume that a putative medical defendant would be forced to guess at the alleged standard of care, or at the actions he allegedly should have taken to comply with the standard of care, from these negatively phrased statements. Our Supreme Court noted that if, for example, a physician is alleged to have amputated the wrong limb, "it would be obvious to a casual observer" that the physician should have amputated the correct limb. *Roberts*, *supra* at 694 n 12. Our Supreme Court did not consider a failure to diagnose an ectopic pregnancy to be so obvious, but that was in the context of a circular statement to the effect that the standard of care was the standard of care. *Id*. at 695 n 12. Here the standard of care explicitly refers to the negatively phrased statements. In this case, no guesswork is required to appreciate that the standard of care is to have taken the actions that defendant allegedly failed to take. For the same reason, it is obvious that plaintiff alleges that defendant should have taken those actions in order to comply with the standard of care.

Finally, the notice of intent states, "If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001." This perfunctory statement, taken by itself, would be insufficient to explain how defendant's alleged violations of the standard of care resulted in the death, as required by MCL 600.2912b(4)(e). However, it must be viewed in the context of the entire document, the facts underlying the case, and the proper pleading standard. The notice of intent, as a whole, reveals that Dr. Lauer was conducting a procedure on a major blood vessel that involved inserting a wire into that vessel and that during the procedure Dr. Lauer perforated the blood vessel. Dr. Lauer then failed to take steps that might have permitted him or a surgeon to repair the vessel, such as stopping the administration of an anticoagulant,[3] performing a pericardiocentesis,[4] notifying a surgeon, and maintaining access to the blood vessel.

Although much of the terminology would make sense only to someone knowledgeable about medicine or a medical professional, defendants are, in fact, all medical professionals or medical facilities operated by medical professionals. In any event, there is no real guesswork involved in coming to the conclusion that Dr. Lauer poked a hole an artery, causing massive bleeding that was not stopped in time to prevent the decedent's death. Finally, the purpose of the notice of intent is to give notice of a claim against the specified parties. Defendants, as medical

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[3] A drug or chemical that prevents blood from clotting.

[4] A procedure to draw fluid out of the sac surrounding the heart.

professionals, presumably keep records of their medical procedures and undoubtedly recall any unusual mishaps with their patients. Before discovery has begun, it is defendants who have the most ready access to essentially all the information about a given case. Under the pleading standard we have articulated, a medical malpractice plaintiff is only obligated to provide defendants with notice of the claims against them at a presuit stage of the proceedings. The defendants have in their possession most of the pertinent facts from their own records. It strains credulity to conclude that they would not understand the nature of the suit against them after reading the notice of intent here. Therefore, this notice of intent meets all the requirements of MCL 600.2912b(4) with respect to Dr. Lauer.

We therefore conclude that the notice of intent here was adequate with respect to Dr. Lauer and inadequate with respect to Borgess Medical Center and Heart Center for Excellence. The trial court therefore should not have dismissed the claim against Dr. Lauer, but it properly dismissed the claims against Borgess Medical Center and Heart Center for Excellence.

V. Dismissal With or Without Prejudice

Plaintiff then argues that if any claims are dismissed, they should be dismissed without prejudice so that a new personal representative could be appointed. Plaintiff argues that the wrongful death saving provision, MCL 600.5852, would grant the successor personal representative additional time in which to commence a new suit. Given our holding, this is moot with respect to Dr. Lauer, but we nevertheless address it because we agree that the notice of intent was insufficient and dismissal was thus appropriate with respect to the two medical facility defendants.

Under MCL 600.5852, the personal representative of a decedent has two years after receipt of letters of authority in which to commence a wrongful death action based on medical malpractice. This provision does not specifically state, in so many words, whether a *successor* personal representative receives an *independent* two-year period in which to commence suit. Our Supreme Court addressed this issue in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). Our Supreme Court unanimously held that this Court had, in our previous attempts to interpret MCL 600.5852, erroneously "misquoted the statute by inserting 'the' before 'letters of authority.'" *Id.*, p 32. Thus, our Supreme Court explained:

> The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Id.*, p 33.]

Therefore, our Supreme Court held that a successor personal representative receives a new, independent two-year period in which to commence suit, albeit as long as he or she does so within the five-year repose period.

This Court has published two opinions addressing the more specific situation presented here: the first personal representative has filed an untimely action, and a successor personal representative seeks to file a new action to overcome the untimeliness of his or her predecessor's

action. Significantly, those two opinions reached opposing and irreconcilable results. In *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), a panel of this Court concluded that a successor personal representative was not entitled to commence a new suit. In *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006), another panel of this Court reached the opposite conclusion. The *McLean* panel concluded that the plaintiffs were afforded their full two years in which to commence suit but failed to do so because of their own negligence rather than because of uncontrollable circumstances, so *Eggleston*'s interpretation of MCL 600.5852 was inapplicable and the successor personal representative was not entitled to a new saving period. The *Verbrugghe* panel concluded that *McLean* had ignored the plain language of the statute, on which *Eggleston* had relied, and determined that MCL 600.5852 granted successor personal representatives a second bite of the apple. However, instead of declaring a conflict with *McLean*, the *Verbrugghe* panel concluded that *McLean* was not binding.

Under our court rules, "[w]hen a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473; 556 NW2d 517 (1996). We are therefore bound to follow the result reached by the *McLean* panel. Under the dictates of *McLean*, because plaintiff brought an untimely action against the corporate defendants as a result of filing a defective notice of intent with respect to them, any successor personal representative is precluded from bringing a new suit. Accordingly, we are required to affirm the dismissal with prejudice of the claims against the corporate defendants.

VI. Conflict with *McLean*

However, we believe, as did the *Verbrugghe* panel, that *McLean* was incorrectly decided because it simply failed to follow the plain rule articulated in the statute and by our Supreme Court. In *Eggleston*, a successor personal representative filed a complaint within two years of his appointment, but more than two years after the first personal representative was appointed. *Eggleston*, *supra* at 31. That was the *only* fact that our Supreme Court deemed relevant to its straightforward reading of the statute and the simple rule that every personal representative is entitled to two years after receipt of his or her letters of authority within which to file a complaint, irrespective of any predecessors. Therefore, *Eggleston* holds that a successor personal representative does indeed receive a new, independent two-year period in which to commence suit, albeit as long as he or she does so within the five-year repose period, *irrespective of* a predecessor's failed suit. The *McLean* panel applied a factual distinction, without any authority, that is not explicitly set forth in the statute and was not identified as relevant by our Supreme Court. We believe that this was erroneous.

We recognize that MCL 700.3613 states in relevant part, "After appointment and qualification, a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party." Thus, if the predecessor representative actually filed a complaint and a successor representative is appointed while the complaint is pending, the successor must be substituted in the already commenced claim. It does not follow, however, that the dismissal here should have been with prejudice. The only issue decided in this case is that the notice of intent was insufficient and that the action must be

dismissed on that basis. A dismissal on this basis alone would never be with prejudice because it is not a decision on the merits. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). It is a separate question whether the period of limitations has expired. While *Roberts* tells us that the period of limitations is not tolled when a complaint is preceded by an insufficient notice of intent, plaintiff does not rely on a tolling of the period of limitations. Rather, plaintiff asserts that her successor personal representative (who was appointed on May 24, 2005) had until October 6, 2006 to file a complaint. Under MCL 600.5852 and *Eggleston*, this is correct. We believe the dismissal with respect to the corporate defendants should have been without prejudice, and we perceive no reason why MCL 700.3613 should affect our analysis.

Despite our belief that *McLean* was wrongly decided, we are required by MCR 7.215(J)(1) to follow it. Therefore, as stated above, dismissal of the claims in this case with respect to the corporate defendants must be with prejudice. However, we recommend, pursuant to MCR 7.215(J)(2) and (3), that this case be submitted to a special panel to resolve whether a successor personal representative may, under MCL 600.5852, receive a new two-year period in which to file suit and thereby overcome a predecessor's untimely filing.

VII. Conclusion

We note that the only substantive disagreement on this panel concerns whether *McLean* was correct in its application of MCL 600.5852 to successor personal representatives' attempts to file actions after predecessor personal representatives filed untimely actions and whether a conflict panel should therefore be convened on that narrow basis. This panel is otherwise unanimous regarding the law that is binding on us. There is no disagreement about the standard of pleading applicable to notices of intent or the conclusions that the notice of intent here was adequate with respect to Dr. Lauer but inadequate with respect to Borgess Medical Center and Heart Center for Excellence.

The order dismissing the claim against defendant Dr. Lauer is reversed. The order dismissing with prejudice the claims against Borgess Medical Center and Heart Center for Excellence is affirmed. The matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis